

UNITED MALAYAN BANKING CORP. BHD.

v.

ROLAND CHOONG SHIN CHEONG

HIGH COURT MALAYA, JOHOR BAHRU

JAMES FOONG JC

[CIVIL APPEAL NO. 11-42 1988]

25 FEBRUARY 1991

COMPANY LAW: *Appointment - Whether agent of mortgagor or mortgagee - Assignment of power of appointment under debentures - Letter of indemnity - Effect of - Whether premature termination of appellant makes mortgagor responsible - Principles in **Gaskell v. Gosling**.*

In this case, the appellants, UMBC appointed the respondents R as receivers of S under 2 debentures executed between UMBC and S. R's services were terminated after 4 months. R filed a claim against UMBC for payment of its professional fees and disbursements incurred while being a receiver.

The Magistrate granted judgment in favour of R; hence this appeal.

The issues were the appointment of the receiver and which party is responsible for payment of a receiver's professional fees. The English case of *Gaskell v. Gosling* and the principles enunciated by the House of Lords as to whether the receiver was an agent of the mortgagor of the mortgagee were examined.

The issues in the appeal are:

- (1) whether the appellants liable to the professional fees and disbursement of the respondent as a receiver and,
- (2) if not, are the appellants liable to pay the respondent's professional fees and disbursements under an implied indemnity which the respondent alleged the appellants had granted him.

Held:

- [1] (a) The power to appoint a receiver is usually provided for under the mortgage deed and in this case, under the 2 debenture deeds created by the company in favour of the appellants;
- (b) the powers and duties of the receiver are set out in s. 6.03 of the debenture and s. 6.05 sets out the remuneration and also states that the mortgagee disclaims any liability towards the receiver's fees and disbursements.
- [2] (a) The law and practice of the receivership is that the receiver for all intents and purposes, is the agent of the mortgagor (*Gaskell v. Gosling* followed and *Deyes v. Wood* distinguished);
- (b) though the mortgagor has no power over the receiver's appointment or removal nor that of any control over his duties and powers, a receiver is deemed to be the mortgagor's appointment and agent;
- (c) for valuable consideration, the mortgagor has relinquished his rights to the management of his property to an agent whose appointment he cannot interfere with. This appointment of the receiver will stand good against mortgagor and all persons claiming through him.

- a** [3] (a) Though the appellant may have appointed him, the respondent in law and in fact was appointed by the company and this power of appointment was assigned by the company to the appellant under the 2 debenture deeds for valuable consideration which was the grant of the loan facilities;
- b** (b) as such R's professional fees and disbursement is not the responsibility of the appellant; parties who do not wish to be bound by a certain liability should contract out of it.
- c** [4] (a) The draft letter of indemnity was for the appellant to undertake separately to pay or reimburse the respondent of the expenses and remuneration for acting as receiver in the event of non recovery from the proceeds of sale against the respondent in the event that the debentures prove to be invalid or the appointment defective;
- (b) this request for payment was not met by the appellant nor was the draft letter of indemnity ever executed by the appellant;
- (c) there was no evidence of any implied indemnity on the part of the banker to pay the receiver's fees and disbursements.
- d** (d) it cannot be said that there is an implied indemnity when the request for an express indemnity was not answered to and agreed upon.
- [5] The basic principle of receivership as laid down by the High Court in *Gaskell v. Gosling* that, as the receiver is appointed by the defaulting company, it is the defaulting company that is responsible for the payment of the fees and disbursements to the receiver, was followed and applied.
- e** [Appeal allowed.]
- Cases referred to:**
Deyes v. Wood & Ors. [1911] 1 KB 806
Gaskell v. Gosling [1896] 1 QB 672
Gaskell v. Gosling [1897] AC 576
- f** For the appellant - M/s. Tan & Tan
 For the respondent - M/s. Jackson & Masacorale

JUDGMENT

James Foong JC:

- g** This appeal is brought by the appellants against the decision of the learned Magistrate in Johore Bahru.
- The appellants are bankers who appointed the respondent in writing to be a receiver of properties belonging to a company by the name of Syarikat Incorporated Plastic Industry Sdn. Bhd. ("the company"). The appellants exercised their powers of appointment under 2 debentures issued by the company in favour of the appellants.
- h** The respondent accepted the appointment as receiver and proceeded to carry out his duties. Some 4 months after the appointment, the appellant terminated the services of the respondent after certain amount of work was carried out by the respondent but before the disposal and realisation of the company's assets.
- i** After the termination of the respondent as receiver, the respondent filed a claim against the appellants for a sum of RM12,292 being professional fees and disbursements incurred while being a receiver.

The learned Magistrate gave judgment in favour of the respondent for the amount as claimed thus leading to this appeal. **a**

Both Counsels for the appellants and the respondent agreed that the issues in this appeal are as follows:

- (1) are the appellants liable to the professional fees and disbursement of the respondent as a receiver and, **b**
- (2) if the appellants are not, are the appellants liable to pay the respondent's professional fees and disbursements under an implied indemnity which the respondent alleged the appellants had granted him?

As for the first issue, the learned Magistrate finds that the appellants were liable to pay the respondent and also because of an implied understanding between the parties since the respondent had done similar receivership jobs for the appellant as instructed by appellant's manager of another branch. **c**

As regards to the first issue, one must examine the creation, function and the law relating thereto. A receiver is mainly appointed by mortgagee who has granted financial assistance or loans to a mortgagor. When the mortgagor defaults or breaches any terms and conditions in the repayment of such loans, a receiver is then appointed. The main functions of a receiver are to receive an account to the mortgagee for any income such as rent produced by the assets under the mortgage, to preserve the assets and subsequently to sell the same. The proceeds of sale are then applied to repay outstanding sums due to the mortgagee. **d**

The power to appoint a receiver is usually provided for under the mortgage deed and in this case, under the 2 debenture deeds created by the company in favour of the appellants. It is a usual term under a debenture deed as in this case under s. 6.02(c) of the 2 debenture deeds that, the mortgagee may appoint in writing any person to be receiver of the assets so mortgaged or charged and in the like manner from time to time remove any receiver so appointed and appoint another or others in his stead. **e**

The powers and duties of a receiver are also usually spelled out and in this case under s. 6.03 of the 2 debenture deeds, the receiver mentioned therein can: **f**

do all such other reasonable acts and things as may be considered to be incidental or conducive to any of the matters or powers aforesaid and which he lawfully may or can do as agent of the company.

Further, the remuneration of the receiver is also usually spelled out and, in this case s. 6.05 of the 2 debenture deeds provide for payment of the receiver so appointed. This section provides that the nett proceeds of any sale of the company's assets by the receiver shall be applied firstly in paying all cost charges and expenses of and incidental to the appointment of the receiver including his reasonable remuneration and all outgoings properly paid by him. Next in priority of payment from the nett proceeds of sale is the payment of the mortgagee's interest, thereafter towards the repayment of the principal sum due and owing to the mortgagee. Finally if there is anything left the balance will be paid back to the mortgagor. **g**

Again, most debenture deeds also contain terms wherein the mortgagee disclaims any liability towards the receiver's fees and disbursements. In this case this provision is found in the proviso of s. 6.05 of the said 2 debenture deeds which read as follows: **h**

save as aforesaid the bank shall be under no liability to the receiver and or manager for his remuneration cost charges or expenses or otherwise. **i**

a By deduction from the aforesaid, the receiver is appointed by the mortgagee with full powers of dismissal and replacement. Further, the receiver reports and account to and pays over the proceeds of sale of the company assets to the mortgagee after deducting his own professional fees and disbursements. The mortgagor does not seem to have any powers over appointment or duties of the receiver. Curiously, relating to the provision regarding the receiver's fees and disbursements, the mortgagees disclaim all liabilities and responsibilities thereto.

b In view of the aforesaid position, one must determine whether the receiver is an agent of the mortgagee or mortgagor.

Though at a glance one would have thought that due to the circumstances of the receiver's appointment and the control over him, the mortgagee would be the principal and therefore liable to pay receiver's fees and disbursement. However, in the case of *Gaskell v. Gosling* [1897] AC 576 it was decided by the House of Lords that a receiver is an agent of the mortgagor. Though the mortgagor has no power for his appointment or removal nor that of any control over his duties and powers he is deemed to be the mortgagor's appointment and agent. For valuable consideration, the mortgagor has relinquished his rights to the management of his property to an agent whose appointment he cannot interfere with. This appointment of the receiver will stand good against mortgagor and all persons claiming through him. Further, all directions and powers given and conferred upon the receiver were supposed to emanate from the mortgagor. The mortgagee though he is the actual appointor and has laid down all powers of the receiver, is, as far as responsibility of the receiver is concerned, not involved. The appointment and powers of the receiver are supposed to emanate from the mortgagor.

c Why is this position so? In order to understand the aforesaid principle one must refer back to the development and creation of receivership under the English Common Law. This is best explained in part of the judgment of Rigby LJ whose dissenting judgment in the Court of Appeal on this point was upheld by the House of Lords in the stated case of *Gaskell v. Gosling* reported in 1896 1 QB at p. 672.

d For the sake of good order and understanding I apprehend below the historical development of receivership by Rigby LJ at p. 691:

e A mortgagor left in possession of the mortgaged property, whether real or personal, had a right to receive the income and apply it to his own use, without becoming liable to account to the mortgagee. If there was no receiver, the mortgagee could only make the income available for keeping down the interest on his security by entering into possession. This entry into possession by a mortgagee was always considered a strong assertion of his legal rights, since he did not come under any obligation to account to the mortgagor except in a suit for redemption. He was accordingly treated with exceptional severity in a suit for redemption and made to account, not only for what he actually received, but for what he might without wilful default have received. This was bad enough when there was only one mortgage; but the position became much worse when the mortgage was a second mortgage, since the second mortgagee could at any moment be turned out by the first, and for the sake of such a precarious possession it could seldom be worth while for a second mortgagee to incur the liabilities of a mortgagee in possession. Still greater were the risks and less desirable the possession when the mortgaged property consisted of or included, as it might do, property embarked in trade and subject to the vicissitudes of commercial business. It follows of course from the almost penal liabilities imposed upon a mortgagee in possession that Courts of Equity were very slow to decide that possession had been taken, and would not do so unless satisfied that the mortgagee in possession took the possession in his capacity of mortgagee without any reasonable ground for believing himself to hold in any other capacity: *Parkinson v. Hanbury*.

f (2) The Courts also favoured any means which would enable the mortgagee to obtain the

advantages of possession without its drawbacks. Mortgagees began to insist upon the appointment by the mortgagor of a receiver to receive the income, keep down the interest on incumbrances, and hold the surplus, if any, for the mortgagor, and to stipulate often that the receiver should have extensive powers of management. Presently mortgagees stipulated that they themselves should in place of the mortgagor appoint the receiver to act as the mortgagor's agent. This made no difference in the receiver's position, and imposed no liability on the mortgagee appointing. Though it was the mortgagee who in fact appointed the receiver, yet in making the appointment acted, and it was the object of the parties that he should act, as agent for the mortgagor.

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After considering the aforesaid this Court is of the similar view as those stated by Rigby LJ in *Gaskell v. Gosling* that the receiver is for all intents and purposes the agent of the mortgagor.

The respondent's Counsel tendered to this Court the English case of *Deyes v. Wood & Ors.* [1911] 1 KB 806 wherein it was decided that the receiver was acting as agent of the debenture holders by whom he was appointed and not of the company, and that receiver was therefore entitled to remuneration from the debenture-holders. However, a careful reading of the decision of the learned Judge in the said case, the general principle that a receiver is always the agent of the mortgagor as stated in *Gaskell v. Gosling* was not deviated from. What was decided was based on the fact that the provision incorporating a certain section of the then Conveyancing Act of England which adopted the principle that the receiver should be the agent of the mortgagor was mistakenly left out. As such it was interpreted that the principle enunciated in *Gaskell v. Gosling* did not apply in the particular case, thus inferred that the receiver became the agent of the debenture holders and therefore liable for his fees. This case of *Deyes v. Wood* was decided solely on its own facts and did not disturb the adopted general principle that the receiver is an agent of the mortgagor.

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However, in our case it is more than clear whose agent the receiver is as regards to payment of his fees and disbursements. Section 6.05 of the 2 debenture deeds clearly spelled out that the receiver should first pay himself from the proceeds of sale of the company's assets. If this is so, the company (that is) the mortgagor would actually be paying him. Further, the proviso in s. 6.05 declares that the appellant (that is) mortgagee shall be under no liability to the receiver for his remuneration cost charges or expenses or otherwise.

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Under the aforesaid circumstances and as this Court adopts the principle as stated in *Gaskell v. Gosling* as good law, the appellants are not responsible to pay the respondent his fees and disbursements as he is not the agent of the appellants. Though the appellants may have appointed him, the respondent in law and in fact was appointed by the company and this power of appointment was assigned by the company to the appellants under the 2 debenture deeds for valuable consideration which was the grant of the loan facilities. The appointment of the respondent and the powers given to him came from the company through the appellants. As such his professional fees and disbursement are not the responsibility of the appellants. Besides, this is clearly stated in the proviso of s. 6.05 of the 2 debenture deeds where the appellants were declared not liable and responsible for the respondent's fees and disbursements.

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The law and practice of receivership in the United Kingdom has been in existence for more than a hundred years. This may be more recent in our country. However, such law and practices are adopted and followed by the local commercial community. The understanding of the parties in commerce are based on this law and practice and similarly so are security documents drafted on such understanding and beliefs. As such, I find no reason that this should be changed. The principle enunciated in *Gaskell v. Gosling* remains good law in this country. Any parties who wish not to be bound by it should contract out of it.

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- a* The respondent did argue that he was not aware of the terms and conditions stipulated in the 2 debenture deeds since his letter of appointment did not say so.

This contention of the respondent cannot be accepted since in the letter of appointment of the respondent as receiver it was clearly provided that his appointment was:

- b* subject to the powers and provisions in the conditions endorsed on the said debenture contained.

Added to this, both copies of the said debenture deeds were forwarded to the respondent by the appellant solicitors together with the letter of appointment.

- c* Relating to the second issue of implied indemnity alleged to be granted by the appellant to the respondent, it is a fact not denied by the appellant that the respondent did forward to them on 5 April 1984 a draft letter of indemnity. In this letter, the respondent also requested what appeared to be an initial disbursement of RM5,000.

The draft letter of indemnity was for the appellant to undertake separately to pay or reimburse the respondent for the expenses and remuneration for acting as receiver in the event of non recovery from the proceeds of sale against the respondent in the event the debentures should prove to be invalid or the appointment defective.

- d* This request for payment was not met by the appellant nor was the draft letter of indemnity ever executed by the appellant. From such evidence and the contents of subsequent correspondence between the parties, this Court finds no evidence of any implied indemnity on the part of the appellant to be responsible to pay the fees of the respondent.

- e* The very nature of forwarding to the appellants the draft letter of indemnity, seems to indicate that the respondent was aware of his precarious position relating to his remuneration and disbursements. If the respondent was under the apprehension and belief that the appellant being his appointor was responsible and liable for his fees and disbursements, why then did he ask for an indemnity? This goes to show that the respondent was aware of the law and practice that in the case of receivership, the receiver is an agent of the mortgagor and as such it is better and safer for the receiver to obtain from the mortgagee who appointed him an indemnity for his fees and disbursements together for any loss or damages and claims for his liability as a receiver in order to protect himself. Under such circumstances it cannot be said that there is an implied indemnity when the request for an express indemnity was not answered to and agreed upon.
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- g* The respondent also contended that since his service as a receiver was prematurely terminated, he was not able to recover his fees and disbursement under the said debentures. If his service had not been terminated he would have had, after the disposal of the company's assets, recovered his fees and disbursements first. Due to premature determination, the appellant should be responsible for his fees and disbursements.

- h* This Court is unable to accept such contentions since the basic principle of receivership is that the appointment and responsibility of the fees and disbursements of a receiver is with the mortgagor and not the mortgagee.

For reasons aforesaid stated this Court allows the appeal of appellants with cost.

Also found at [1991] 2 CLJ 1042